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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1959~~ 1960

No. ~~752~~ 47

LAWRENCE CALLANAN, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 1, 1960
CERTIORARI GRANTED APRIL 4, 1960

SUPREME COURT OF THE UNITED STATES

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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JUNE 16, 1960

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

COPY

Criminal No. 27761 (2)

UNITED STATES OF AMERICA, Plaintiff,

—v.—

LAWRENCE CALLANAN, CARL BIANCHI, L. A. THOMPSON, WILLIAM POSTER and R. M. SECOR, Defendants.

INDICTMENT

The Grand Jury charges:

Count I

1. That at all times hereinafter mentioned, a part of the interstate commerce of the United States has consisted of the transportation of men, materials, supplies, and machinery used in the construction, removal, and reconstruction of pipe lines and appurtenances thereto used in the distribution and transportation of natural gas, crude oil, petroleum, and refined petroleum products; that a further part of such commerce has consisted of the production, purchase, sale, transportation, distribution, and movement of natural gas, crude oil, petroleum, and refined petroleum products in pipe lines between the several states of the United States.

2. That at all times hereinafter mentioned, O. R. Burden Construction Corporation, hereinafter referred to as the "construction company," Sinclair Pipe Line Company, and [fol. 2] Platte Pipe Line Company were parties to several contracts for the construction of certain portions of an in-

terstate pipe line such as is referred to hereinabove, running from Cushing, Oklahoma, to Forest City, Illinois, and passing through the State of Missouri; and for the removal of certain portions of another such pipe line between Shannondale, Missouri, and Wood River, Illinois, and passing through the State of Missouri. That for the purpose of performing said contracts and also as a direct consequence of performing the same, the parties thereto, and various other persons and organizations, caused men, materials, supplies, and machinery to move in interstate commerce between various points in the United States and the sites of said construction and removal and, more particularly, from outside the State of Missouri into the State of Missouri. That said pipe line companies at all times hereinafter mentioned, as well as at times prior thereto and subsequent thereto, caused crude oil, natural gas, petroleum, and refined petroleum products to move in interstate commerce by means of said pipe lines. That all of these movements were directly affected by the undertakings hereinbefore mentioned and by the acts of defendants hereinafter mentioned.

3. That at all times hereinafter mentioned, Lawrence Callanan was an agent and representative of Local No. 562 of the United Association of Pipe Fitters affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitters Industry of the United States and Canada, American Federation of Labor; that Carl Bianchi was agent and representative of Local No. 513 of the International Union of Operating Engineers, American Federation of Labor; that L. A. Thompson was agent and representative of Local No. 574 of the Building Material and Construction Chauffeurs Union affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, American Federation of Labor; that L. A. Thompson was an agent and representative of Teamsters Joint Council No. 78; that William [fol. 3] Poster and R. M. Secor were agents and representatives of the Eastern Missouri Laborers' District Council and of Local Nos. 110 and 916, respectively, of the International Hod Carriers', Building and Common Laborers' Union of America, American Federation of Labor; that

said Lawrence Callanan, Carl Bianchi, L. A. Thompson, William Poster, and R. M. Secor, in their aforesaid official and representative capacities, represented the members of their respective unions who were to be employed and were employed on those portions of said pipe line projects located in the State of Missouri.

4. That commencing on or about the first day of March, 1951, the exact date being to the grand jurors unknown, and continuing thereafter up to and until the date of the return of this indictment, in the Eastern Division of the Eastern District of Missouri and within the jurisdiction of this Court,

Lawrence Callanan,
Carl Bianchi,
L. A. Thompson,
William Poster, and
R. M. Secor,

defendants herein, well knowing all matters of fact aforesaid, did Knowingly, Willfully, Unlawfully, and Feloniously combine, conspire, confederate, and agree together and with each other, and with divers other persons, whose true and full names are to the grand jurors unknown, to obstruct, delay, and affect interstate commerce between the several states of the United States and the movement of the aforesaid articles, commodities, materials, supplies, machinery, and men, in such commerce, by extortion, to wit: by obtaining property to the value of $28,016.18 in the form of money, and the payment of money to third parties for and on behalf of defendants, from O. R. Burden, individually and as agent of said construction company, with the consent of said O. R. Burden and said company, induced by the wrongful use of actual and threatened force, violence, and fear.

[fol. 4] 5. That it was part of said conspiracy that defendants would demand and obtain the property mentioned in paragraph 4 herein for the personal benefit of defendants and not for the benefit of labor unions and organizations nor the members thereof, respectively represented by defendants as aforesaid.

6. That it was part of said conspiracy that defendants, for the purpose of enforcing their demands upon said O. R. Burden and said construction company for property, as mentioned in paragraphs 4 and 5 herein, would, in their purported capacities as labor union representatives, under the guise of attempting to obtain benefits for, and protecting the rights of members of said unions, embark wrongfully and corruptly upon a course of oppressive action against said O. R. Burden and said construction company, by calling and conjuring up strikes, causing labor disputes, work stoppages, and difficulties in connection with said pipe line projects, and other labor troubles under various pretexts and claims of right, but not actually for the purpose of obtaining legitimate labor objectives and as legitimate devices of organized labor to secure improvement in wages, working conditions, and terms of employment of union members employed by said construction company on said pipe line projects, defendants well knowing that said actions would delay, obstruct, and affect said pipe line projects, and the transportation from out the State of Missouri of articles, commodities, materials, supplies, machinery and men to said pipe line projects within the State of Missouri.

7. That it was part of said conspiracy that defendants would make arbitrary, excessive, unreasonable, and unjustified demands upon the said O. R. Burden, individually and as agent of the construction company, for the hiring of workmen not necessary to the performance of said contracts [fol. 5] and whose hiring would not have been required nor acceded to but for defendants' use of force, violence, and fear.

8. That it was part of said conspiracy that such demands for unnecessary workmen would be waived or withdrawn and that the construction company would be excused from hiring such unnecessary workmen if defendants obtained the property, referred to in paragraphs 4 and 5 herein, from O. R. Burden and said construction company.

9. That it was part of said conspiracy that defendants would demand and enforce the use of wasteful methods and

labor practices on said pipe line projects under the guise of representing their respective labor organizations and the members thereof.

10. That it was part of said conspiracy that such demands for the use of wasteful methods and labor practices would be waived and withdrawn if the defendants obtained the property, referred to in paragraphs 4 and 5 herein, from O. R. Burden and said construction company.

11. That it was part of said conspiracy that defendants would and did make threats to O. R. Burden and the construction company that defendants would use the force and power of their authority as representatives of labor organizations to prevent said construction company from using labor in the manner usual in said company's business unless and until defendants obtained the property, mentioned in paragraphs 4 and 5 herein, from O. R. Burden and said construction company.

12. That it was part of said conspiracy that defendants would assure said O. R. Burden and said construction company that if the property, mentioned in paragraphs 4 and 5 herein, were obtained by defendants, pleasant labor relations would be maintained with all workmen represented by [fol. 6] defendants, and that the performance of the aforesaid contracts would proceed in a workmanlike and efficient manner, and in the manner usual in said construction company's business.

13. That it was part of said conspiracy that defendants would and did make threats to the said O. R. Burden and said construction company that defendants would exercise the force and power of their authority as representatives of labor organizations to cause strikes and work stoppages during the performance of said contracts if defendants did not obtain the property mentioned in paragraphs 4 and 5 herein, from said O. R. Burden and the construction company aforesaid.

14. That is was further part of said conspiracy that defendants would make the demands and threats mentioned in paragraphs 5, 6, 7, 9, 11, 13 herein for the purpose of instilling and planting in the minds of said O. R. Burden and

the agents of said construction company, fear that if defendants' demands for money as aforesaid were not complied with, economic loss would result to said O. R. Burden and said construction company as the result of inefficient and unworkmanlike labor, and also work stoppages, work slowdowns, jurisdictional disputes, and strikes.

Contrary to the terms and provisions of Section 1951, Title 18 (Rev.), United States Code.

F nm 10,000 or I nm 20 y or b

[fol. 7] Count II

1. That at all times hereinafter mentioned, a part of the interstate commerce of the United States has consisted of the transportation of men, materials, supplies, and machinery used in the construction, removal, and reconstruction of pipe lines and appurtenances thereto used in the distribution and transportation of natural gas, crude oil, petroleum, and refined petroleum products; that a further part of such commerce has consisted of the production, purchase, sale, transportation, distribution, and movement of natural gas, crude oil, petroleum, and refined petroleum products in pipe lines between the several states of the United States.

2. That at all times hereinafter mentioned, O. R. Burden Construction Corporation, hereinafter referred to as the "construction company," Sinclair Pipe Line Company, and Platte Pipe Line Company were parties to several contracts for the construction of certain portions of an interstate pipe line such as is referred to hereinabove, running from Cushing, Oklahoma, to Forest City, Illinois, and passing through the State of Missouri; and for the removal of certain portions of another such pipe line between Shannondale, Missouri, and Wood River, Illinois, and passing through the State of Missouri. That for the purpose of performing said contracts and also as a direct consequence of performing the same, the parties thereto, and various other persons and organizations, caused men, materials, supplies, and machinery to move in interstate commerce between various points in the United States and the sites of said construction and removal and, more particu-

larly, from outside the State of Missouri into the State of Missouri. That said pipe line companies at all times hereinafter mentioned, as well as at times prior thereto and subsequent thereto, caused crude oil, natural gas, petroleum, and refined petroleum products to move in interstate commerce by means of said pipe lines. That all of these movements were directly affected by the undertakings hereinbefore mentioned and by the acts of defendants hereinafter mentioned.

[fol. 8] 3. That at all times hereinafter mentioned, Lawrence Callanan was an agent and representative of Local No. 562 of the United Association of Pipe Fitters affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitters Industry of the United States and Canada, American Federation of Labor; that Carl Bianchi was agent and representative of Local No. 513 of the International Union of Operating Engineers, American Federation of Labor; that L. A. Thompson was agent and representative of Local No. 574 of the Building Material and Construction Chauffeurs Union affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, American Federation of Labor; that L. A. Thompson was an agent and representative of Teamsters Joint Council No. 78; that William Poster and R. M. Secor were agents and representatives of the Eastern Missouri Laborers' District Council and of Local Nos. 110 and 916, respectively, of the International Hod Carriers', Building and Common Laborers' Union of America, American Federation of Labor; that said Lawrence Callanan, Carl Bianchi, L. A. Thompson, William Poster, and R. M. Secor, in their aforesaid official and representative capacities, represented the members of their respective unions who were to be employed and were employed on those portions of said pipe line projects located in the State of Missouri.

4. That commencing on or about the first day of March, 1951, the exact date being to the grand jurors unknown, and continuing thereafter up to and until the date of the return of this indictment, in the Eastern Division of the

[fol. 9] Eastern District of Missouri and within the jurisdiction of this Court,

Lawrence Callanan,
Carl Bianchi,
L. A. Thompson,
William Poster, and
R. M. Secor,

defendants herein, well knowing all matters of fact aforesaid, did Knowingly, Willfully, Unlawfully, and Feloniously obstruct, delay, and affect interstate commerce between the several states of the United States and the movement of the aforesaid articles, commodities, materials, supplies, machinery, and men, in such commerce, by extortion, to wit: by obtaining property to the value of $28,016.18 in the form of money, and the payment of money to third parties for and on behalf of defendants, from O. R. Burden, individually and as agent of said construction company, with the consent of said O. R. Burden and said company, induced by the wrongful use of actual and threatened force, violence, and fear.

5. Defendants threatened and committed acts of violence to the persons of officers and employees, and to the property, of said O. R. Burden Construction Company.

6. Defendants caused the said O. R. Burden to fear that the contracts mentioned in paragraph 2 would be delayed in completion of their performance, that said O. R. Burden and O. R. Burden Construction Company would suffer financial loss in the performance of said contracts and that officers and employees of said company would be injured and property of said company would be damaged, if the defendants did not obtain property as stated in paragraph 4, under the guise of representing their respective labor organizations and the members thereof.

[fol. 10] 7. Defendants threatened the said O. R. Burden and the said construction company that defendants would, in their purported capacities as labor union representatives, embark wrongfully and corruptly upon a course of oppressive action against said O. R. Burden and said construction

company by calling and conjuring up strikes, causing labor disputes, work stoppages, and difficulties in connection with said pipe line projects, and other labor troubles, under various pretexts and claims of right, under the guise of representing their respective labor organizations and the members thereof.

8. Defendants threatened said O. R. Burden and said construction company that defendants would make arbitrary, excessive, unreasonable and unjustified demands upon said O. R. Burden and said construction company for the hiring of workmen not necessary for the performance of said contracts, under the guise of representing their respective labor organizations and the members thereof.

9. Defendants threatened the said O. R. Burden and the said construction company that defendants would demand and enforce the use of wasteful methods and labor practices on said pipe line projects, under the guise of representing their respective labor organizations and the members thereof.

Contrary to the terms and provisions of Section 1951 Title 18 (Rev.), United States Code,

F nm 10,000 or I nm 20 y or b.

Harry Richards, United States Attorney.

A True Copy of the Original
Filed March 3, 1954

Attest: Geo. J. Brennan, Clerk, By Harold G. Pryce, Deputy Clerk.

Dated: Aug. 24, 1959, St. Louis, Mo.

(Seal)

[fol. 11]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 27761 (2)

UNITED STATES OF AMERICA,

—v.—

LAWRENCE CALLANAN.

JUDGMENT AND SENTENCE AS TO DEFENDANT LAWRENCE CALLANAN—July 19, 1954

On this 19th day of July, 1954 came the attorney for the government and the defendant appeared in person and with Morris A. Shenker, his attorney.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty heretofore returned by jury of the offenses of wilfully, unlawfully and feloniously conspiring to obstruct, delay and affect commerce and in the furtherance of said conspiracy did obtain property in the form of money for personal use and profit by extortion as charged in count one; and with wilfully, unlawfully and feloniously obstructing, delaying and affecting commerce, by extortion of property in the form of money for personal use as charged in count two of the indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Twelve (12) Years Under Count one of the indictment herein;

Twelve Years (12) under Count two of the indictment herein;

the term of imprisonment imposed on said defendant under Count Two to run consecutively and cumulatively, [fol. 12] and not concurrently, with term of imprisonment of twelve years imposed on defendant under said Count One of said indictment. Execution of sentence imposed on said defendant under said Count Two of said indictment, suspended and defendant placed on probation under said Count Two for a period of Five Years, which term of probation shall begin and run consecutively and not concurrently with them of imprisonment of Twelve Years imposed upon defendant under Count One of such indictment; and in addition to the general conditions of probation the Court imposes the special conditions that during the term of probation the defendant shall not, directly or indirectly, hold any office or act in any representative capacity, at any time, for any labor union or labor organization of any character, with or without compensation, which term and special conditions of probation do not restrict defendant in becoming, or continuing as a member of any labor organization.

Rubey M. Hulen, United States District Judge.

[fol. 13] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 27761 (3)

UNITED STATES OF AMERICA, Plaintiff,

—v.—

LAWRENCE CALLANAN, et al., Defendants.

MOTION OF DEFENDANT LAWRENCE CALLANAN FOR CORRECTION OF SENTENCE UNDER COUNT I—Filed December 17, 1958

Defendant Lawrence Callanan moves the Court under Rule 35, F. R. Crim. P., or, in the alternative under 28 U.S.C. §2255, to correct the sentence of twelve years im-

prisonment imposed against him on July 19, 1954 on Count I, by relieving him of four years imprisonment imposed under said sentence, which sentence, when taken together with the twelve years imprisonment imposed on Count II on said date, was in excess of the maximum twenty years imprisonment authorized by law, and as grounds for this motion states:

(1) Defendant is presently and has been since July 19, 1954 incarcerated under said sentence of July 19, 1954.

(2) Count I of the indictment charged, that from March 1, 1951 until the date of the indictment, that defendants did wilfully, unlawfully and feloniously conspire to obstruct, delay and affect interstate commerce by extortion, by obtaining property in the form of money in the amount of $28,016.18 for and on behalf of defendants from O. R. Burden, individually and as agent of the O. R. Burden Construction Company, with the consent of O. R. Burden and said company, induced by the wrongful use of actual and threatened force, violence and fear.

[fol. 14] (3) Count II of the indictment charged, that from March 1, 1951 until the date of the indictment, that defendants did wilfully, unlawfully and feloniously obstruct, delay, and affect interstate commerce by extortion by obtaining property in the form of money in the amount of $28,016.18 for and on behalf of defendants from O. R. Burden, individually and as agent of the O. R. Burden Construction Company, with the consent of O. R. Burden and said Company, induced by the wrongful use of actual and threatened force, violence and fear.

(4) Count I, thus, charged conspiracy to commit the same offense set forth in Count II.

(5) This defendant was convicted under both counts and on July 19, 1954 was committed to imprisonment for a period of twelve years under Count I and twelve years under Count II of the indictment, the term of imprisonment imposed on him under Count II was made to run consecutively and cumulatively, and not concurrently, with the term of imprisonment imposed on him under Count I of the indictment. Execution of sentence imposed under Count II was

suspended and he was placed on probation under Count II for a period of five years, which term of probation was made to run consecutively with the term of imprisonment imposed under Count I.

(6) Section 1951 of Title 18 provides:

> "Whoever in any way or degree obstructs, delays, or affects commerce * * * by robbery or extortion or attempts or conspires so to do or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

(7) Said section thus imposed a maximum penalty of twenty years imprisonment for obstruction of commerce by any of the manners set forth in said section.

[fol. 15] (8) Congress by said section did not intend that a person be subjected to two penalties for obstruction of commerce by extortion and by conspiracy.

(9) This defendant, by receiving a total sentence of twenty four years for obstruction of commerce by extortion under Count II and by conspiracy under Count I has received punishment in excess of the twenty year maximum authorized by law.

Morris A. Shenker, 408 Olive St., St. Louis 2, Mo.,
Attorney for Defendant Callanan.

Oral argument and leave to present evidence requested.

[fol. 17]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 27761 Court 3

UNITED STATES OF AMERICA, Plaintiff,

—v.—

LAWRENCE CALLANAN, Defendant.

St. Louis, Missouri
March 9, 1959.

Transcript of Hearing on Motion for Correction of Sentence—March 9, 1959

Transcript of evidence adduced and proceedings had during the hearing of motion of defendant for correction of sentence under count I in above styled cause before Honorable Randolph H. Weber, Judge of the District Court of the United States, Eastern District of Missouri, Eastern Division, presiding in Court No. 3 thereof.

APPEARANCES:

Mr. Wayne H. Bigler, Jr., Assistant United States Attorney.

Mr. Morris A. Shenker, Attorney for Defendant.

[fol. 18] COLLOQUY BETWEEN COURT AND COUNSEL

The Court: This is just a matter for the presentation of the law?

Mr. Shenker: The only thing we have, Your Honor, we worked out a stipulation of what the record should consist of in this case. In this stipulation we have a provision that either party may add to the record. I will hand the Court

the stipulation. You might want to see it, so that when we discuss it, the matter will be clear to the Court.

Under the law, as I understand, applicable to motions of this kind, some determination should be made as to what the record will consist of that the Court will concern itself with.

The Court: All right.

Mr. Shenker: This stipulation, if it please the Court, which was signed and agreed to by both sides with the exception that either side may add to the record, provides primarily that the record shall consist of the indictment in the case, the instructions of the Court, that is the instructions that the Judge gave to the jury, and the judgment and sentence of the Defendant Callanan, which was imposed on July 19, 1954. In addition to that the stipulation of facts which was entered into, and the original of which I just handed to the Court. Anything further than that, if it please the Court, is something that, if Mr. Bigler has something that he wants to add pertaining to the stipulation, it is perfectly agreeable to us. We have no objection to add-
[fol. 19] ing anything else. As far as we are concerned, we are satisfied with making those four designated additions, the stipulation, the indictment, the instructions of the Court, and the judgment and sentence, as constituting the record on which we proceed and are asking to read before the Court.

The Court: The record may show that the stipulation is filed.

It occurs to me, however, that the Court is not bound to confine itself within the stipulation. I think the stipulation may be filed for the purpose of joining up and bringing in writing just exactly what the stipulations are. But this is a motion of the defendant in the case to correct the sentence entered in this court, and I think the Court can only be guided by what the record is, even to the extent that it wouldn't have to be limited by what the parties say the record is. If I should find something in the record, for instance, which would be contrary to that which is entered into in the stipulation, I don't think the Court should be bound by it.

Mr. Shenker: I frankly don't know. But we are not attempting to bind the Court or limit the Court. To the contrary, this we thought would aid the Court and clarify the issues.

The Court: For that purpose the Court is allowing it to be filed, but at the same time I am stating that I am not going to be, and I don't think I have to be, confined to mat-
[fol. 20] ters only those matters which are raised in the stipulation, because this is a matter which goes to the Court correcting a sentence and a judgment of this court. And I don't think the parties could limit the Court to any particular part of this proceeding. I think then we understand each other. As I understand, the stipulation is for the purpose of being of aid and assistance to the Court.

Mr. Shenker: That is right, Your Honor, clarifying the issues.

The Court: O. k.

Mr. Shenker: In line with that, Your Honor, the indictment the Court has. That is a matter in the file, and there would be no necessity to offer that in evidence. It is in the record and part of the file. The instructions of the Court, that were given, we have that. I don't know if the Court has those in the file or not; but we have them.

The Court: They would be in the transcript.

Mr. Shenker: We have them printed. Your Honor, we have them in a printed volume. I am submitting them to the Court from the volume, that is submitting the volume, and the instructions are [redacted] set out verbatim.

The Court: All right.

Mr. Shenker: It would be easier for the Court to read it rather than the typed form.

[fol. 21] Will you mark them Defendant's Exhibit No. 1?

(Thereupon the document above referred to was marked by the reporter as Defendant's Exhibit No. 1.)

May it please the Court, I will introduce Defendant's Exhibit 1, which exhibit contains the instructions of the Court. I am trying to find the page where they start. The instructions begin, if it please the Court, on page 662 and they continue to page 704 at the bottom of the page.

If we may, if the Court please, we should like to mark the stipulation which we gave you as Defendant's Exhibit No. 2.

(Thereupon the stipulation above referred to was marked by the reporter as Defendant's Exhibit No. 2.)

We will offer into evidence Defendant's Exhibit No. 2, if it please the Court, which is the stipulation of facts which we previously discussed with the Court.

The indictment I do not believe has to be marked.

The Court: It is a part of the file.

Mr. Shenker: That is right. And the judgment and sentence of the Court, that is also a matter of the record proper in the court file. Those are the only matters, if it please the Court, that we are offering in support of our motion.

The Court: All right. Mr. Bigler, do you have anything to offer?

Mr. Bigler: The only thing I would like to add, as far as [fol. 22] the stipulation is concerned, Your Honor, which Mr. Shenker and Mr. Glaser made up from the record, as I understand from appellant's brief and the brief of the Solicitor General, is a change which was just called to my attention in the proposed stipulation before it was signed here. I think that probably that could be set out. It relates to the method of payment or alleged payment to the defendant Callanan of this extortion money. On page 3 of the stipulation, up at the top there is—

The Court: Under Section (g)?

Mr. Bigler: Under subsection (g), the second sentence: "A friend of Callanan set up a fictitious company which sent invoices to the Burden Company." That was changed a little bit from the proposed stipulation. I should like to insert at that point after that sentence—

The Court: Just a minute. Which line is that?

Mr. Bigler: It is the third and fourth lines on page 3 of the stipulation.

The Court: "A friend of Callanan—"

Mr. Bigler: "—set up a fictitious company which sent invoices to the Burden Company." Right at that point I propose to insert an asterisk, and in discussing what is meant by the asterisk to refer to the appellant's statement

in appellant's brief in the United States Court of Appeals which goes into further details in connection with that allegation.

[fol. 23] I don't know whether this would be stipulated to by Mr. Shenker, but as long as we are permitted to bring in things outside of the stipulation, may we at this time, Your Honor, call the Court's attention to the more detailed facts in evidence. On page 7 of the brief, it is stated as follows; at the very bottom of this page of appellant's brief in the Court of Appeals: It is stated Sariego testified that after the meeting Callanan called Balch, an international organizer at the union meeting, and told him to set up a fictitious company, the Welders—Pipeline Welders' Supply Company. It sent out Pipeline Welders' Supply Company invoices in the amount of $1606.40 and $1616.24 to the Burden Company and was paid for both invoices by check. The following paragraph probably should be inserted too: Burden Corporation checks dated October 14th and October 30, 1952, each in the amount of $3791.04, were sent to our mailing address.

That is all that I want to insert, the further details of this charge, which I was advised of today.

Mr. Shenker: We have no objection to that insertion, Your Honor.

Mr. Bigler: Other than that, I think the references made to the transcript and to the record of the case proper.

The Court: I have manually put in the asterisk here at the place where you want to make that insertion. I would suggest that the matters to which you have just referred and [fol. 24] just introduced and which will be received in evidence be reduced to writing and attached to the back of the stipulation.

Mr. Bigler: All right. That is very easily done.

The Court: Of course you have them there. You have actually referred to them.

Mr. Bigler: It is page 27 of the appellant's brief in the United States Court of Appeals on appeal proper in the case.

The Court: All right.

Reporters' Certificate to foregoing transcript (omitted in printing).

[fol. 25]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

[Title omitted]

DEFENDANT'S EXHIBIT NO. 2—STIPULATION

I. The United States and Lawrence Callanan stipulate that the record in this case on defendant Callanan's motion to correct his sentence may consist of the following documents: (a) The Indictment; (b) the Instructions of the Court; and (c) the Judgment and Sentence of Defendant Callanan imposed on July 19, 1954.

II. The United States and Lawrence Callanan further stipulate that the record in this case on defendant Callanan's motion to correct his sentence may consist of the following summary of evidence offered at the trial by the government to sustain the conviction on both counts of the indictment, it being specifically understood that Lawrence Callanan is not admitting that any of the matters hereinafter set out in the statement of facts took place but that it is done for the purpose of presenting a statement of the evidence of the trial in the light most favorable to the government.

(a) Defendants were labor union representatives; Callanan for the Pipefitters; Bianchi for the Operating Engineers; Thompson for the Teamsters; Porter and Secor for the Laborers.

(b) On a 1951 pipe line construction project, the O. R. Burden Construction Company, which employed the crafts represented by the defendants, encountered numerous difficulties. The welders were working only four hours a day [fol. 26] for a full day's pay; more men were put on the job than were necessary and labor costs were higher than for similar work in other comparable regions.

(c) In May 1952, when the Burden Company was getting ready to start upon another project involving the con-

struction of a new pipe line and the taking up of an old pipe line in Missouri and Illinois, a pre-job meeting was held with the defendants as representatives of the craft unions. Mr. Burden testified that, at the request of Callanan, he had lunch with Callanan alone; that at such luncheon, he told Callanan about his difficulties and said that something drastic would have to be done if the company was to complete the project without great loss. Callanan then asked Burden how much money there was in the job and whether there could be one cent a foot on the project, a rate which would total $28,000 or $29,000, on the whole job. Callanan told Burden that the other crafts would share in the division but that the welders would get the greater share because they had not interfered with the construction company as had the other crafts and that he would talk to the other crafts. Burden told Callanan that no payment would be made until a substantial portion of the work was done.

(d) At this meeting between Callanan and Burden, it was agreed that payments to the defendants would be made by false invoices.

(e) Burden also testified that, after the project had been started, he had a private meeting with Callanan in August, 1952, in which he complained that defendants were not living up to the agreement. Callanan assured him that the work would pick up and that he would talk to the other crafts.

(f) The Burden Company paid $28,000 on invoices from various companies or individuals.

[fol. 27] (g) Thompson, Porter and Secor were shown to have received money from the Washington Equipment and Construction Company which submitted bills to Burden. A friend of Callanan set up a fictitious company which sent invoices to the Burden Company.* In November 1952, after Bianchi complained to Burden that he had not received his share of the agreement, Burden gave Bianchi two checks totalling $2,516.00 made to the order of two names appearing on invoices. In March 1953, Thompson made a similar complaint and thereafter a check for $3,980.00 payable to the Washington Equipment Company was sent to that company.

III. It is further stipulated that Callanan commenced service of his sentence of imprisonment under the judgment in this case on July 19, 1954 and is presently in custody under this sentence at the United States Penitentiary at Leavenworth, Kansas.

IV. It is further stipulated that either party has the right to augment this stipulation by any facts which appear in the record of the case as printed for the United States Court of Appeals for the Eighth Circuit in Causes No. 15,139 to 15,143 inclusive.

Morris A. Shenker, 408 Olive Street, St. Louis 2, Mo., Attorney for defendant Callanan.

Wayne H. Bigler, Jr., Asst. United States Attorney, Attorney for Plaintiff.

[fol. 28] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 27761

UNITED STATES OF AMERICA, Plaintiff,

—v.—

LAWRENCE CALLANAN, Defendant.

OPINION—May 8, 1959

Lawrence Callanan has filed a Motion to Correct Sentence Under Count I, under Rule 35, F.R.Cr.P., or, in the Alternative under Title 28, §2255, U.S.C. Said defendant will hereinafter be referred to as Movant.

Movant was convicted in this Court under an Indictment in two counts charging him with conspiracy to extort in the first count and with the substantive offense of extortion in

the second count. The Indictment was based upon Title 18, §1951, U.S.C., known as the Hobbs Act, or the Anti-Racketeering Act.[1]

Movant was sentenced on July 19, 1954, by the late Honorable Rubey M. Hulen, then Judge of this Court, [fol. 29] to 12 years imprisonment upon Count I (the conspiracy), and 12 years imprisonment upon Count II (the extortion), said sentences to run consecutively and cumulatively and not concurrently, with the term imposed in Count I. However, the sentence imposed under Count II was suspended and he was placed upon probation under Count II for a period of five years, which term of probation was ordered to begin and run consecutively and not concurrently with the term of imprisonment of 12 years imposed upon defendant under Count I. (In other words, the probation period was to begin at the end of the service of the sentence imposed in Count I.)

Movant began serving his sentence immediately, but his case, along with his co-defendants, was appealed to the United States Court of Appeals for the Eighth Circuit, and the decision affirming his conviction, sentence and judgment is found in *Callanan* v. *United States* (1955), 223 F. 2d 171, cert. den. 350 U.S. 862.

Movant's contention in his Motion for Correction of Sentence is unique. He seeks to correct the sentence under Count I contending that it is an illegal sentence when taken together with the sentence imposed on Count II; he further contends Count I and Count II are both variants of a single offense and as he received a 12-year sentence on each count, or a total of 24 years, the sentence is therefore 4 years in excess of the maximum punishment of 20 years provided in the statute; he contends that the sentence is [fol. 30] valid to the extent of the maximum only, to wit,

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[1] Title 18, §1951, U.S.C., in its pertinent part: "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

20 years, and is void as to the excess of 4 years; therefore, he seeks to have the Court correct the sentence by eliminating 4 years of the excessive judgment under Count I so as to provide for imprisonment for 8 instead of 12 years.

Although the Court cannot grant the relief Movant seeks (for the reasons that will be stated in this Opinion) he is probably entitled to an "A" for ingenuity, to say the least.

Movant, in his argument and brief, runs the whole gamut of cases,[2] both old and new, concerning the merging of offenses into one crime and the application of the "Rule of Lenity."[3]

The *Universal C.I.T. Credit Corp.* case applied the rule of lenity to record keeping provisions of the Fair Labor Standards Act, holding that the Act prohibited a "cause of conduct" rather than separate offenses for each breach of statutory duty; the *Prince* case applied the rule to the crime of entry into a bank with intent to rob and the con- [fol. 31] summated robbery; the *Bell* case applied the rule to transportation of two women on the same trip in violation forbidding the transportation for purpose of prostitution; in the recent *Ladner* case the Supreme Court, in reversing and remanding to the District Court, applied the rule holding that a single discharge of a shotgun constitutes only a single violation of a statute penalizing assault on federal officers even though more than one federal officer was wounded; the *Heflin* case follows the rule set down in the *Prince* case; the *Gore* and *Harris* cases refused to apply the rule in narcotic cases where the same drug was the object of both sale and possession, holding that legislation revealed the determination of Congress to "turn the screw

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[2] *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218; *Prince* v. *United States*, 352 U.S. 322; *Bell* v. *United States*, 349 U.S. 81; *Ladner* v. *United States*, 230 F. 2d 726, reversed & remanded 358 U.S. 169; *Heflin* v. *United States*, (1959) 358 U.S. 45, 79 S.Ct. 451; *Gore* v. *United States*, 357 U.S. 386; *Harris* v. *United States*, (1959) 359 U.S. 19.

[3] Generally stated the "Rule of Lenity" is that where the intention of Congress is not clear from the Act itself, and reasonable minds might differ as to its intention, the Court will adopt the less harsh meaning. See *Ladner* v. *United States*.[2]

of criminal machinery—detection, prosecution and punishment—tighter and tighter."

Movant contends that an examination of the Anti-Racketeering Act, in the light of its legislative history, suggests that while each of the disjunctive itemizations of the Act might constitute a separate crime, when standing alone, the rule of lenity should be applied when more than one of the elements exist. In other words, that while a person may be prosecuted and convicted of either of the offenses enumerated in the act, he cannot be prosecuted for more than one of these offenses, as the separate acts would merge into one offense.

The rule has been well established that where a person is charged with conspiracy to violate some federal law under the general conspiracy statute (Title 18, U.S.C., §371) [fol. 32] and then is charged separately with doing the substantive or overt act which is the object of the conspiracy, he may be charged, tried and sentenced separately on each count or offense. See *Burton* v. *United States* (1906), 202 U.S. 344, 377; *United States* v. *Rabinowich*, 238 U.S. 78; *Chew* v. *United States* (C. A. 8, 1925), 9 F. 2d 348; *Pinkerton* v. *United States* (1946), 328 U.S. 640, 643; *Lisansky* v. *United States* (C. A. 4, 1929), 31 F. 2d 846; *Brown* v. *United States* (C. A. 8, 1948), 167 F. 2d 772; *United States* v. *Rosenblum* (C. A. 7, 1949), 176 F. 2d 321.

In the *Pinkerton* case (supra), l.c. 643, Mr. Justice Douglas said:

> "Nor can we accept the proposition that the substantive offenses were merged in the conspiracy. • • • The common law rule that the substantive offense, if a felony, was merged in the conspiracy, has little vitality in this country. It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses."

To this line of cases Movant raises the charge that they refer to overt acts which are enumerated in the statutes as specific crimes and with the general statute on conspiracy. He points out that in the case at bar all the offenses, in-

cluding conspiracy, are charged in just one statute and that no overt act is required.

There is no question but that the statute under which Movant was tried and convicted, neither by word nor implication, requires an overt act in its prohibition against [fol. 33] conspiracy to obstruct commerce by extortion. *Ladner, et al.* v. *United States* (C. A. 5, 1948), 168 F. 2d 771, 773, cert. den. 335 U.S. 827.

The Circuit Court of Appeals for the 8th Circuit has affirmed conviction in cases arising under this very statute, wherein the defendants were sentenced for conspiracy and also for the overt acts of the statute. *Nick, et al.* v. *United States*, 122 F. 2d 660, 669 [12], cert. den. 314 U.S. 687, rehearing denied 314 U.S. 715; *Hulahan* v. *United States*, 214 F. 2d 441, cert. den. 348 U.S. 856.

In *Nick, et al.* v. *United States*, the Court said:

> "We are unable to get the force of the argument that the indictment is duplicitous. The counts in the indictment cover at least two conspiracies: one in connection with extorting money in return for a wage contract, and the other in connection with the employment of the Co-operative Sound Service Supply Company. Also, the indictment involves at least two separate extortion acts: the payment of $6,500.00 and the 'borrowing' of $2,000."

Actually, the elements of a conspiracy are different. A substantive or overt act may be proven without involvement of a conspiracy. "It (a conspiracy) has ingredients, as well as implications, distinct from the completion of the unlawful project." (Parentheses supplied.) *Pinkerton* v. *United States* (supra), l.c. 644.

The Movant says the recent cases[2] show the trend toward a more lenient interpretation of these dual, or duplicitous, acts of Congress, and this Court should take it on itself to follow that trend.

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[2] *Id.* at p. 23.

[fol. 34] A reading of those cases shows a rule of lenity applied where the intention of Congress is not clear. In *Prince* v. *United States*,[2] at l.c. 325, the Chief Justice said:

> "(This case) can and should be differentiated from similar problems in this general field raised under other statutes. The question of interpretation is a narrow one, and our decision should be correspondingly narrow."

This wording leads this Court to believe that each of these type of cases must stand on its own bottom.

In view of the long established holdings that conspiracy may be the subject of trial and sentence in connection with trial and sentence for the overt act, or result, of such conspiracy; in view of the holdings that this may be done in matters where this very act has been in question (*Nick* and *Hulahan* cases, supra); in further view that this exact issue in this particular statute and factual situation has not been passed upon in light of the recent decisions of the Supreme Court; it does not seem reasonable, nor logical, for this trial court to upset the verdict herein on the grounds of illegality of the sentence.

While arguing the "intent of Congress" herein, it might be just as reasonable and logical to say that Congress, at the time it passed this statute, knew of the long line of decisions holding conspiracy and overt acts to be separately punishable and therefore, inserted conspiracy in the Act as a separate crime. Even the use of the word "or" itself, denotes an intention to "separate" or "disjoin".

[fol. 35] There is the further fact that this Movant appealed from the judgment of this Court to the 8th Circuit Court of Appeals; the judgment was affirmed and certiorari denied by the Supreme Court. *Callanan* v. *United States*, supra. If Movant had error to raise in this case, he failed to raise it and it is res judicata. *Lipscomb* v. *United States* (C. A. 8, 1955), 226 F. 2d 812, l.c. 817 [9]. Except for

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[2] *Id.* at p. 23.

Rule 35[4] and Title 28, §2255, U.S.C.[5] he has exhausted his remedies.

Rule 35, F.R.Cr.P. provides that the Court "may correct an illegal sentence at any time". In view of the matters [fol. 36] previously discussed, I hold that both conspiracy and the overt act may be tried and separate sentences imposed under Title 18, §1951, U.S.C., and therefore the sentence is not illegal and that portion of Rule 35 does not apply.

If reduction of sentence is sought by Movant, under the last half of Rule 35 (and actually that is what the long range result of his unique argument comes down to) he is too late as the Court's authority expires within the time limits therein contained.

Therefore Movant cannot have the relief he seeks under Rule 35 for the reasons heretofore stated.

Movant's alternative prayer under Title 28, §2255, U.S.C., raises two additional problems: first, does §2255 apply to this situation and, second, if so, is Movant entitled to relief thereunder?

In 1949 the present §2255 was added to Title 28, which is a part of Chapter 153 on Habeas Corpus. In considering a matter of habeas corpus in *Sunal* v. *Large*, 332 U.S. 174, 177, the Supreme Court said:

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[4] Rule 35 "The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari."

[5] 28 U.S.C., §2255 (in its applicable parts): "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, etc."

> "The normal and customary method of correcting errors of the trial is by appeal."

The Court was there dealing with and refused to grant the writ to a defendant who failed to appeal. The Court fur- [fol. 37] ther said concerning errors of law committed by a trial court, beginning at l.c. 181:

> "That error did not go to the jurisdiction of the trial court. Congress, moreover, has provided a regular, orderly method for correction of all such errors by granting an appeal to the Circuit Court of Appeals, and by vesting us with certiorari jurisdiction. • • • If in such circumstances a writ of habeas corpus could be used to correct error, the writ would become a delayed motion for a new trial, renewed from time to time as the legal climate changed."

In *Ladner* v. *United States*[2] the question as to the applicability of §2255 was discussed but not determined. At l.c. 172 therein the Court disposed of that issue by saying that the government's contention was not raised before the District Court or the Court of Appeals, and at l.c. 173, the Court said:

> "The question of the scope of collateral attack upon criminal sentences is an important and complex one, judging from the number of decisions discussing it in the District Courts and the Courts of Appeals. We think that we should have the benefit of a full argument before dealing with the question."

The Court then went on to deal with the merits of the judgment and sentence without determining the procedural question. But, Mr. Justice Clark filed a dissenting opinion in which he raised serious doubts as to the permission of collateral attacks upon judgments under §2255. At l.c. 181, he said:

> "It is clear that in enacting §2255, Congress did not intend to enlarge the available grounds for collateral attack, but rather sought only to correct serious ad-

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[2] *Id.* at p. 23.

ministrative problems that had developed in the exercise over the years of habeas corpus jurisdiction."

[fol. 38] Therefore, the majority opinion in *Ladner* aforesaid lends no answer to the problem of whether §2255 applies in these instances and the dissenting opinion indicated that one Justice believes that it did not apply.

The Supreme Court has, however, reached and decided questions of statutory construction, although the questions were raised by collateral attack on consecutive sentences. (See *Gore* [involving §2255] and *Prince* [involving F.R. Cr.P. 35][2]; also *Tinder* v. *United States*, 345 U.S. 565 [§2255]; *Ebeling* v. *Morgan*, 237 U.S. 625 [habeas corpus]; *Morgan* v. *Devine*, 237 U.S. 632 [habeas corpus].)

So, while the Court has refused to definitely say whether §2255 applies in instances of this kind, yet they have considered matters on their merits when presented under that section and under habeas corpus.

Without determining whether §2255 applies, let us look to the section to see what remedy it might afford one who has been tried, convicted, appealed and was refused certiorari, and now, for the first time, raises anew the issue to correct an illegal sentence.

In the first place, the section does not entitle Movant to a hearing, "unless the motion and the files and records of the case conclusively show the prisoner is entitled to relief."

In the next place, the section affords relief to a prisoner "claiming the right to be released." *Heflin* v. *United States*;[3] (for history of §2255, see *United States* v. *Hayman* (1952), 342 U. S. 205.)

[fol. 39] The Movant here is not claiming the right to be released now. By the application of some higher mathematics, known only to himself and counsel, he wants to be released 4 years from now by cutting his sentence under Count I from 12 to 8 years. Yet, the 12 years sentence on Count I is certainly within the limits of the maximum punishment of 20 years. He is only serving "time" on Count I because execution of sentence under Count II was suspended. The Count II sentence has no effect on his "time" now, except to put him on 5 years probation at the conclusion of his sentence.

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[2] *Id.* at p. 23.

Under §2255 the trial court has a duty to review the files and records of the case.[5] From a review of the motion, files and records this Court holds that Movant is not entitled to relief under this section as the record clearly discloses that the Court had jurisdiction, none of his rights were violated in the trial of the case, the judgment was appealed and affirmed and the judgment imposed was within the limits prescribed by the statute under which he was convicted. Therefore, Movant is denied relief on his alternative plea under §2255.

This Court might also call attention of Movant to the ruling of the 8th Circuit Court of Appeals in *Holbrook* v. *United States* (1943), 136 F. 2d 649, wherein the Court at l.c. 652, said:

> "Since neither sentence of itself is invalid by the terms of the statute, and the only invalidity in the situation derives from the constitutional prohibition against double jeopardy or punishment, justice and [fol. 40] reason dictate, in such a case, that the court and not the defendant shall have the right to say which of the two consecutive sentences, * * * shall be eliminated in order not to subject the defendant to the possibility of double punishment."

See also *Garrison* v. *Reeves* (C. A. 8, 1941), 116 F. 2d 978; *Costner* v. *United States* (C. A. 4, 1943), 139 F. 2d 429; *Dimenza* v. *Johnston* (C. A. 9, 1942), 130 F. 2d 465.

Under those rulings it would be for the Court to say which one of the sentences is not proper and which one should be eliminated. It is possible that if a higher court determines the sentence to be improperly imposed that it could further say that the improper sentence was upon Count II.

Clearly, it was the intention of the sentencing judge to impose 12 years imprisonment. It was clear that he intended to impose another 12 years imprisonment but he suspended execution thereon and placed the Movant on probation for 5 years at the conclusion of his sentence under

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[5] *Id.* at p. 27.

Count I. Both the 12 year sentence and the 5 year probation are within the 20 year maximum provided by the statute.

If Movant is released from prison and subsequently violates his probation and is brought in for execution of sentence upon Count II, it would then not be impossible for him to seek relief under the statute or by way of habeas corpus.

As the sentence imposed upon Count I is held to be legal, and within the statutory limits, this Court sees no reason at [fol. 41] this premature date to correct the sentence as to Count II even if it had power to do so under *Holbrook*, supra.

In *United States* v. *Walker* (D.C. N.Y., 1952), 107 F. Supp. 218, it was said:

> "Where legality of judgment of conviction was not questioned and sentence imposed was not in excess of maximum authorized and was not otherwise subject to collateral attack, and petitioner was not claiming right to be released from imprisonment, application for order resentencing petitioner or correcting sentence, * * *, was premature."

To summarize, this Court holds that the sentence imposed upon Movant was not illegal; that Movant is not entitled to relief under Rule 35; that Movant is not entitled to relief under §2255 for the sentence imposed in Count I; that any correction of the sentence upon Count II is premature.

Wherefore, an Order shall be entered denying Movant's Motion and the relief therein sought.

Done this 8th day of May, 1959.

Randolph H. Weber, United States District Judge.

[fol. 42] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 27761

UNITED STATES OF AMERCA, Plaintiff,

—v.—

LAWRENCE CALLANAN, Defendant.

ORDER DENYING MOTION FOR CORRECTION OF SENTENCE—May 8, 1959

This matter is pending upon this defendant's Motion for Correction of Sentence under Count I. A hearing was held thereon with Stipulation and exhibits being filed and the matter was passed for the filing of briefs. The Court has reviewed the briefs of the parties and has reviewed the Motion, files and records of the case. The Court has also written and filed an Opinion herein. And being now fully advised in the premises, it is:

1. Found by the Court that the Motion, files and records of the case conclusively show that said defendant is entitled to no relief;

2. That the sentence imposed upon this defendant is legal;

3. That Movant is not entitled to relief under Rule 35 F.R.Cr.P., and is not entitled to relief under Title 18, §2255, U.S.C. for sentence imposed on Count I;

[fol. 43] 4. That any correction of sentence upon Count II is premature.

Wherefore, it is Ordered that Movant's Motion for Correction of Sentence under Count I be and the same is hereby overruled and the relief therein prayed for is denied.

Done this 8th day of May, 1959.

Randolph H. Weber, United States District Judge.

[fol. 44] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 45]

IN UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 16,293

LAWRENCE CALLANAN, Appellant,

—v.—

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

OPINION—February 2, 1960

Before: Gardner, Woodrough, and Vogel, Circuit Judges.

GARDNER, Circuit Judge:

This is an appeal from an order of the trial court overruling appellant's motion under Rule 35, Federal Rules of Criminal Procedure, Title 18, United States Code, or in the alternative, under Section 2255, Title 28, United States Code, to correct the sentences imposed on him on July 19, 1954.

On March 3, 1954, the defendant and four others were charged in a two count Indictment. Count One charged

that from March 1, 1951, until the date of the Indictment, defendants did conspire to obstruct, delay, and affect interstate commerce by extortion by obtaining $28,016.18 [fol. 46] from O. R. Burden, individually and as agent of the Burden Construction Company, induced by the wrongful use of actual and threatened force, violence, and fear. Count two charged that on the same dates defendants did obstruct, delay and affect interstate commerce by extortion by obtaining $28,016.18 from O. R. Burden, individually and as agent of the Burden Construction Company, induced by the wrongful use of actual and threatened force, violence, and fear, in violation of Section 1951, Title 18, United States Code.

The action was tried to the court and a jury and each defendant was found guilty as charged in the Indictment. Appellant, one of the defendants, was thereupon sentenced to a term of imprisonment for a period of twelve years on Count One and twelve years on Count Two of the Indictment. The term of imprisonment on count Two was made to run consecutively with the term of imprisonment on Count One, but execution of sentence on Count Two was suspended and appellant was placed on probation on Count Two for a period of five years and this term of probation was made to run consecutively with the term of imprisonment imposed on Count One. On appeal the judgment was affirmed. *Callanan et al.* v. *United States,* 8 Cir., 223 F.2d 171. Pursuant to the judgment of conviction appellant commenced service of the sentences imposed upon him and is still in custody under this sentence at the United States Federal Prison at Leavenworth, Kansas. The facts pertinent to the instant proceeding were stipulated and hence are not in dispute. They are substantially as follows:

Defendants were labor union representatives; Callanan for the pipefitters, Bianchi for the operating engineers, Thompson for the teamsters, Poster and Secor for the [fol. 47] laborers. On a 1951 pipe line construction project, the O. R. Burden Construction Company, which employed the crafts represented by the defendants, encountered numerous difficulties. The welders were working only four

hours a day for a full day's pay, more men were put on the job than were necessary, and labor costs were higher than for similar work in other comparable regions. In May, 1952, when the Burden Company was getting ready to start upon another project involving the construction of a new pipe line and the taking up of an old pipe line in Missouri and Illinois, a pre-job meeting was held with the defendants as representatives of the craft unions. Mr. Burden testified that, at the request of appellant, he had lunch with appellant alone; that at the luncheon, he told appellant about his difficulties and said that something drastic would have to be done if his company was to complete its project without great loss. He further testified that appellant had asked him how much money there was on the job and whether there would be one cent a foot on the project, a rate which would total $28,000.00 or $29,000.00 on the whole job; that appellant told him that the other crafts would share in the division but that the welders would get the greater share because they had not interfered with the construction company as had the other crafts and that he would talk to the other crafts. Burden told appellant that no payment would be made until a substantial portion of the work was done and it was agreed that payments to the defendants would be made by false invoices. Burden also testified that, after the project had been started, at a private meeting with appellant in August, 1952, he complained that defendants were not living up to the agreement, and that appellant assured him that the work would pick up and that he would talk to the other crafts. The Burden Company paid $28,000.00 on [fol. 48] invoices from various companies or individuals. Thompson, Poster, and Secor were shown to have received money from the Washington Equipment & Construction Company which submitted bills to Burden. There was testimony that a friend of appellant set up a fictitious company which sent invoices to the Burden Company. One Sariego testified that appellant called Balch, an international union organizer, and told him to set up a fictitious company, the Pipe Line Welders Supply Company. Pipe Line Welders Supply Company invoices in the amount of $1,606.40 and $1,616.24 were sent to the Burden Company. Burden Corporation checks dated October 14 and October 30, 1952,

each in the amount of $3,791.04, were sent to a mailing address in payment of these invoices. The court in its instructions allowed the jury to return a verdict for both counts of the Indictment.

In his motion, appellant seeks to correct the sentence imposed on Count One of the Indictment on the theory that in fact but one offense was charged or embodied in the two counts of the Indictment and hence the sentences imposed exceeded the maximum penalty of twenty years fixed by the statute, Section 1951, Title 18, United States Code.

In seeking reversal of the order denying his motion, appellant contends that the court erred in overruling his motion to correct the sentence imposed on him on July 19, 1954 because: (1) Congress, in enacting the Hobbs Act, Section 1951, Title 18, United States Code, did not intend that a person be subject to cumulative penalties for the obstruction of commerce by extortion and conspiracy so to do; (2) the sentence under Count One should be corrected; (3) the remedy under Rule 35, Federal Rules of Criminal Procedure, Title 18, United States Code, or in [fol. 49] the alternative under Section 2255, Title 28, United States Code, is the correct remedy; and (4) appellant is not barred by res judicata from seeking to correct an illegal sentence.

It is the contention of appellant that Count One, which charges a conspiracy to obstruct and delay interstate commerce by extortion, and Count Two, which charges actually obstructing and delaying interstate commerce by extortion, constitute but one offense, the maximum penalty for which, fixed by the so-called Hobbs Act, was twenty years. The question presented is whether the Indictment, though containing two counts, in fact stated but one offense.

When an accused is charged with conspiracy to commit a federal offense in one count and then in a second count is charged with the commission of the substantive offense which is the object of the conspiracy, the Indictment states two offenses, each of which is punishable. *Pinkerton* v. *United States,* 328 U.S. 640; *United States* v. *Rabinowich,* 238 U.S. 78; *Scott* v. *United States,* 10 Cir., 115 F.2d 137; *Hulahan* v. *United States,* 8 Cir., 214 F.2d 441; *Chew* v.

United States, 8 Cir., 9 F.2d 348; *Brown* v. *United States*, 8 Cir., 167 F.2d 772. Answering an argument that a count in an indictment charging a conspiracy to commit an offense and a separate count charging the commission of the offense constituted but one offense, the Supreme Court in *Pinkerton* v. *United States*, supra, said, inter alia:

> "Nor can we accept the proposition that the substantive offenses were merged in the conspiracy. • • • The common law rule that the substantive offense, if a felony, was merged in the conspiracy, has little vitality in this country. It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses."

[fol. 50] In *Brown* v. *United States*, supra, it was contended, as in this case, that a count in the indictment charging a conspiracy to commit an offense and a separate count charging commission of the offense charged but one offense, punishable as such. In the course of the opinion, referring to this contention, we said:

> "Except in some very limited types of situations (none of which is here involved), the commission of a substantive offense and a conspiracy to commit it are distinct crimes and may be separately charged and punished. *Pinkerton* v. *United States*, 328 U.S. 640, 643, 644, 66 S.Ct. 1180, 1182, 90 L.Ed. 1489; *American Tobacco Co.* v. *United States*, 328 U.S. 781, 787-789, 66 S.Ct. 1125, 1128, 1129, 90 L.Ed. 1575. And the substantive offense may be charged and punished as a distinct crime, even though the conspiracy charge also sets out the facts involved in the substantive offense as an overt act of the conspiracy. *United States* v. *Bayer*, 331 U.S. 532, 542, 543, 67 S.Ct. 1394, 1399, 91 L.Ed. 1654."

The same principle is announced in *Scott* v. *United States*, supra, as follows:

> "Although the indictment was not attacked in the trial court by demurrer or motion to quash, the con-

tention is advanced here that it was fatally defective in that appellant and five others were charged in one count with the crime of conspiracy to commit perjury, and appellant alone was charged in the other count with the substantive offense of perjury. It is urged that this constitutes an improper joinder of charges. It is well settled that a conspiracy to commit a crime and the substantive crime of which the conspiracy is the object may be laid as separate counts in a single indictment, and that sentence may be imposed upon each count."

Appellant relies strongly on *United States* v. *Universal C. I. T. Corp.*, 344 U.S. 218, *Prince* v. *United States*, 352 [fol. 51] U.S. 322, *Bell* v. *United States*, 349 U.S. 81, *Ladner* v. *United States*, 358 U.S. 169, and *Heflin* v. *United States*, 358 U.S. 415, in which the Court held that there was only one offense and one sentence permissible, under the rule of lenity. The cases are readily distinguishable. Thus, in the *Universal, Prince, Ladner,* and *Bell* cases, no conspiracy was charged in one count and a substantive act which was the object of the conspiracy in another, while in the *Heflin* case, there was no contention that defendant could not get a separate sentence under the conspiracy count. These cases involved either completed attempts or crimes affecting several persons.

We conclude that the sentences involved were not illegal sentences and Rule 35, Federal Rules of Criminal Procedure, Title 18, United States Code, authorizing the correction only of an "illegal sentence", cannot be invoked.

As to the rights of appellants as determined by Section 2255, Title 28, United States Code, it is noted that this section refers to a claim of "right to be released." It is to be noted that appellant does not claim the right to be released. He admits that he has served only four years of a sentence which he claims should be fixed at eight years. He is, therefore, not entitled to any relief under Section 2255, supra.

Appellant's motion, whether based upon Rule 35 or Section 2255, supra, cannot serve as an appeal. The questions now sought to be litigated could have been urged by him

on appeal from his conviction and hence he cannot collaterally attack the judgment of conviction and sentence by motion. *Taylor* v. *United States*, 8 Cir., 229 F.2d 826; *Shobe* v. *United States*, 8 Cir., 220 F.2d 928; *Burns* v. *United States*, 8 Cir., 229 F.2d 87; *Kaplan* v. *United States*, 8 Cir., 234 F.2d 345; *Hickman* v. *United States*, 8 Cir., 246 [fol. 52] F.2d 178. In the instant case there was an appeal and the judgment was affirmed. *Callanan, et al.* v. *United States*, 8 Cir., 223 F.2d 171. That affirmance covered not only the questions actually raised but also the questions that might have been raised. *Lipscomb* v. *United States*, 8 Cir., 226 F.2d 812; *Mitchell* v. *Village Creek Drainage Dist.*, 8 Cir., 158 F.2d 475. What is said by us in *Lipscomb* v. *United States*, supra, is here apposite. In the course of the decision in that case we, among other things, said:

> " • • • the contentions now presented could have been urged in that proceeding as there is no claim that they arose subsequent thereto and the decision in that proceeding is binding on the defendant not only as to the contentions there made but as to all other contentions which could have been made.
>
> "In the course of our opinion in *Mitchell* v. *Village Creek Drainage Dist.*, 8 Cir., 158 F.2d 475, 477, it is said:
>
> "'It is elementary that res judicata may be pleaded as a bar not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding but also as to any other available matter which might have been presented to that end. *Stevens* v. *Shull*, 179 Ark. 766, 19 S.W.2d 1018, 64 A.L.R. 1258; *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 64 S.Ct. 317, 84 L.Ed. 329; *Jackson* v. *Irving Trust Co.*, 311 U.S. 494, 61 S.Ct. 326, 85 L.Ed. 297; *Billings Utility Co.* v. *Advisory Committee Board of Governors*, 8 Cir., 135 F.2d 108; *Kithcart* v. *Metropolitan Life Ins. Co.*, 8 Cir., 119 F.2d 497; *McIntosh* v. *Wiggins*, 8 Cir., 123 F.2d 316; *Howard* v. *Chicago, B. & Q. R. Co.*, 8 Cir., 146 F.2d 316. The rule is succinctly stated in 30 American Jurisprudence, Sec. 179, at page 923, as follows:

"'"The phase of the doctrine of res judicata precluding subsequent litigation of the same cause of action is much broader in its application that a de- [fol. 53] termination of the questions involved in the prior action; the conclusiveness of the judgment in each case extends not only to matters actually determined, but also to other matters which could properly have been determined in the prior action. This rule applies to every question falling within the purview of the original action, in respect to matters of both claim and defense, which could have been presented by the exercise of due diligence."'

"We have specifically held that the doctrine of res judicata is applicable to a proceeding under Title 28 U.S.C. §2255."

We are of the view that the present proceeding cannot now be maintained but is barred under the doctrine of res judicata.

Being of the view that, for the foregoing reasons, the order appealed from must be affirmed, further discussions of appellant's contentions would unduly extend this opinion and serve no useful purpose. The order appealed from is therefore affirmed.

[fol. 54]

IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16293—September Term, 1959

LAWRENCE CALLANAN, Appellant,

—v.—

UNITED STATES OF AMERICA.

Appeal from the United States District Court for the Eastern District of Missouri.

JUDGMENT—February 2, 1960

This cause came on to be heard on the original files of the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Order of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

February 2, 1960.

[fol. 55] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 56]

SUPREME COURT OF THE UNITED STATES

No. 752—October Term, 1959

LAWRENCE CALLANAN, Petitioner,

—v.—

UNITED STATES.

ORDER ALLOWING CERTIORARI—April 4, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.